croacher claims the property in the encroachment. Here, the defendants did not claim any right of property in the land encroached upon. It was absolutely useless to them. It merely formed part of their wall which could, technically, be shaved off. The first defendants did not sell or purport to sell the 3-4 sq ft of encroachment to the second and third defendants, nor did the latter parties buy nor purport to buy the encroached area. What was sold was No 73A Kovan Road with a surveyed area under a title document which did not include the intruding area. The issue of expropriation was irrelevant.

The real question, to my mind, was whether the defendants should be made to pull down the wall entirely and erect a new wall in its place or to shave the wall to remove the 3-4 sq ft of intrusion which the first defendants did not want and did not claim, but which unfortunately they put there. But this was not a case of deliberate encroachment but one due to carelessness. The nature and extent of the encroachment proved this. Accordingly, I was of the view that counsel was looking at the practical problem and the legal issue from the wrong perspective. Leaving aside all the peripheral facts, the central fact is that the encroachment has no effect on the living space within the four walls of the affected house. Even this might be set right without requiring demolishing or shaving the wall. The only thing that was and continues to be affected is the notional boundary line. Two portions of the wall of No 73A have intruded, very slightly, extending from 4 inches to 0.0001 inch across the boundary line. If in fact the plaintiffs had built their wall touching the entire length of No 73A Kovan Road, the legal problem might have resolved itself in that the boundary would then run in between the two walls. No evidence has been adduced by the plaintiffs to show why this could not have been done.

As to the law, the decision of Thean J in *Tay Tuan Kiat* v *Pritam Singh*[1] was referred to. In that case, TTK sued PS for trespass and sought a mandatory injunction to remove an intruding retaining wall (erected by PS) and erect a new wall on the boundary line. Applying the principle that the court should achieve a fair result followed by Buckley J in *Charrington* v *Simons & Co Ltd*[2] and Megarry J in *Shepherd Homes Ltd* v *Shandham*,[3] the court refused the injunction in that form on the ground that the cost to PS in doing so was out of proportion to any benefit that would be gained by TTK. Instead, the court ordered the chain-linked fence on the retaining wall to be removed and re-erected on the common boundary. The result was that TTK got his land back together with retaining wall.

The facts of the case before me are admittedly different, but the differences are not material. In a sense, the plaintiffs would not 'recover' the 3-4 sq ft of encroachment so long as it is not removed. But, as I have said earlier, the plaintiffs could have but refused to recover it by refusing to build wall to wall. In doing so, the plaintiffs have made it more difficult and costly to remove the encroachment. Even if this court were to order the removal of the encroachment by shaving it off, what the plaintiffs would have would be, in fact, 3-4 sq ft of air space trapped between two walls and which had no practical use or benefit to either party.

The principle applied by Thean J is that of achieving a fair result in the circumstances of the case. In applying the principle, I concluded that, on the evidence, the granting of an immediate mandatory injunction would not be a fair result

Application dismissed.

Solicitors: *Cheong & Cheong*; *Harry Elias & Partners*; *HK Koh & Teo.*

Reported by *Kevin Mathews*

Societe Generale & Ors v City Holdings (Pte) Ltd & Anor

HIGH COURT (SINGAPORE) — SUIT NO 1734 OF 1987
CHUA J
30 NOVEMBER 1990

Civil Procedure — Interim injunction — Whether injunction should have been granted on ex parte motion — Balance of convenience — Balance of convenience need not be considered where plaintiff establishes more than a good arguable claim and defendant has no arguable defence — Material non-disclosure of facts not a ground for discharging interim injunction when such facts should be tried at trial

The first plaintiffs are a French bank with branches in, amongst other places, Manila and Singapore. The second and third plaintiffs are partners of a public accountants firm who had been appointed to be receivers to receive all rents, profits, etc due from mortgaged property belonging to the first defendants. The first plaintiffs ('SG') had entered into the deed of mortgage with the first defendants ('City') in consideration of US$8m lent to or advanced for the benefit of the second defendants ('Krome'). Neither City nor Krome repaid to SG the term loan and eventually, SG's solicitors served a written notice on City that, pursuant to the Land Titles Act (Cap 157, 1985 Ed), SG intended to enter into possession of the mortgaged property and to receive the rents and profits thereof at the expiration of one month from the date of the letter. SG also appointed the second and third plaintiffs to be receivers and later gave them a power of attorney under which they are empowered as agents of SG to enter into and take possession of the mortgaged property and, inter alia, to grant leases and tenancies.

In June 1987, SG instituted the present action against the defendants claiming, inter alia, payment to the bank of the principal sum of US$8m and interest. City also filed a writ against the plaintiffs seeking a declaration, inter alia, that the mortgage was void and that the appointment of the second and third plaintiffs as receivers of income was void. City took out an O 14 application against the second and third plaintiffs, and at this hearing, the deputy registrar gave summary judg-

ment ordering that the private appointment of the second and third plaintiffs as receivers of income by SG be discharged and that the second and third plaintiffs be ordered to account for all moneys held and received for the use of City. The second and third plaintiffs then took out an application for a stay of execution of the order of court and for an injunction to restrain City from demanding or collecting rent from the tenants of the mortgaged property On the hearing of this application, it was ordered that until the appeal had been decided, an escrow account be opened in the joint names of City and the second and third plaintiffs into which all rentals collected shall be paid.

A dispute later arose when a tenant of one of the units of the mortgaged property wanted to renew their lease. City informed the tenant that they and not SG were entitled to grant the lease and warned the second and third plaintiffs that they would not recognize a tenancy agreement entered between SG and the tenant. The tenant, however, signed a tenancy agreement with the second and third plaintiffs as agents for SG, following which City gave notice to the tenant to vacate the premises.

The plaintiffs, on an ex parte application, obtained the interim injunction in this suit, and in this motion, they sought an order that the injunction do continue until trial of the action. The interim injunction restrained the first defendants from, inter alia, unilaterally negotiating and executing any tenancy agreement on their own behalf, and informing or warning tenants that they will not recognize any tenancy agreement entered into with the first plaintiffs.

Held, allowing the motion:

(1) On the defendants' argument that the interim injunction cannot be sustained, on grounds not raised by the statement of claim, the court held that it could grant an interlocutory injunction although not specifically claimed in writ, and that the injunction bore some sensible relationship to the cause of action.

(2) It is wrong on the hearing of an inter partes motion to go into the complexities involved in seeking to disentangle at that stage whether there was full disclosure when the ex parte order was obtained. The matter should normally be dealt with at trial. The material facts which City maintain should have been disclosed are questions of law and facts which should be tried at the trial. In the court's view, City's defences do not show that they have cause to complain for their non-disclosure.

(3) If, as a matter of fact, the plaintiff establishes more than a good arguable claim, more than a serious question to be tried, a case to which the defendant has no arguable defence, the court will without more grant the interlocutory injunction without going on to consider the balance of convenience.

(4) When the iterim injunction was applied for, the second and third plaintiffs as agents for SG, had given notices to all the tenants of the units in the mortgaged property to pay the rent to them and were collecting rent from them. They had also granted tenancies for two units. SG had therefore in law gone into possession of the mortgaged property. The rights of SG have already vested when they applied for the interim injunction and it was not necessary to make an inter partes application. City have no arguable defence and it is not necessary to consider the balance of convenience.

(5) The first defendants have by operation of law acquired the status of mortgagees-in-possession and City have tried to dislodge them from this position. SG are merely defending a position which the law has given them and the interim injunction against City to restrain the acts complained of is justifiable.

(6) Damages in this case would not be adequate to SG. City do not have any source of income over and above that which can be derived from the mortgaged property and do not have the means to pay any appreciable damages.

(7) The status quo to preserve is not only limited to the state of affairs during the period immediately preceding the issue of the writ but also the period immediately preceding the motion for an interlocutory injunction.

Cases referred to

1 *Burdett* v *Hay* 4 De GJ & S 41; 46 ER 829 (refd)
2 *Brink's-Mat Ltd* v *Elcombe* [1988] 3 All ER 188 (refd)
3 *Dormeuil Freres* v *Nicolian Ltd* [1988] 3 All ER 197 (folld)
4 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 (refd)
5 *Garden Cottage Foods Ltd* v *Milk Marketing Board* [1984 AC 130 (folld)

Legislation referred to

Civil Law Act (Cap 43, 1988 Ed) s 4(8)
Conveyancing and Law of Property Act (Cap 61, 1985 Ed) s 23(2)(a)
Land Titles Act (Cap 157, 1985 Ed) s 69(1), (2), (4)
Rules of the Supreme Court 1970 O 29 r 1
Rules of the Supreme Court [UK] O 29 r 1(1)

Alan J Thambiayah for the first plaintiffs.
Gan Hiang Chye (*Chew Kherk Ying* with him) for the second and third plaintiffs.
Raj Singam (*Mohan Reviendran Pillay* and *Ong Chee Kwan* with him) for the first defendants.

Cur Adv Vult

Chua J: This is a motion by the plaintiffs for an order that the interim injunction which they obtained against the first defendants do continue until the trial of this action.

The first plaintiffs, Societe Generale ('SG'), are a French bank with branches in, amongst other places, Manila and Singapore. The second and third plaintiffs are partners of KMPG Peat Marwick, a public accountants firm.

The first defendants, City Holdings (Pte) Ltd ('City'), are a company incorporated in Singapore. The second defendants, Krome Investment Ltd ('Krome'), are a company incorporated in Hong Kong.

On 17 June 1988, the plaintiffs on an ex parte application obtained an interim injunction in the following terms:

> The first defendants, whether by themselves, their directors, servants, agents or otherwise howsoever be restrained from doing or performing the following acts or any of them:
>
> (a) unilaterally negotiating and executing any tenancy agreement on their own behalf in respect of the premises described in the schedule hereto ('the premises')

or any part thereof without the prior written consent of the first, second or third plaintiffs;

(b) informing or warning tenants or prospective tenants of the premises that the first defendants will not recognize any tenancy agreement in respect of the premises or any part thereof entered into or to be entered into with the first plaintiffs or that any such tenancy is invalid;

(c) demanding or collecting rent from the tenants of the premises or any part thereof;

(d) instituting any proceedings for the purpose of compelling tenants or prospective tenants to —

(i) execute tenancy agreement with the first defendants in respect of the premises or any part thereof and/or

(ii) abstain from executing any tenancy agreement in respect of the premises or any part thereof with the first plaintiffs and/or

(iii) pay rent in respect of the premises or any part thereof to the first defendants or their agents;

(e) doing or permitting anything to be done so as to interfere with the use and enjoyment of the premises or any part thereof by any of the tenants or any other person entitled to the use and enjoyment of the premises.

The facts are these: On 26 November 1981, SG entered into a deed of mortgage ('the mortgage') with City, the first defendants, under which, in consideration of the sum of US$8m ('the term loan') lent to or advanced for the benefit of Krome, the second defendants, City mortgaged to SG all their estate or interest in the property now know as Units 1701-1726 (inclusive) 17th storey, International Plaza, Anson Road, Singapore ('the mortgaged property') subject to the covenants and conditions therein set out.

The term loan was made by SG's branch in Manila. The loan account was later transferred by the Manila branch of SG to the Singapore branch of SG.

Neither City nor Krome repaid to SG the term loan. By notice dated 14 March 1987, SG, by their solicitors, Donaldson & Burkinshaw ('D & B') requested City and Krome to pay to SG the sum of US$10,297,297.77 being the principal amount of the term loan of US$8m and accrued interest thereon, as at 24 February 1987, of US$2,297,297.77 calculated in accordance with cl 3 of the covenants and conditions of mortgage, together with all such further interest calculated as aforesaid as should be owing on the date of payment. Notice was also given that if they defaulted in payment for 14 days after service of notice, SG would sell the mortgaged property or would permit a receiver of the income thereof and/or would take such legal proceeding as they might be advised against them without further delay.

D & B in reply to the letter of City dated 16 March 1987, inquiring as to SG's (Singapore) right to call in the mortgage, explained that SG, Manila and SG, Singapore, were one and the same legal entity and gave notice that SG intended to exercise their legal remedy to sell the mortgaged property by public auction or by private treaty in the event that the outstanding principal and interest were not paid on the expiry of the notice.

By a further notice dated, 26 March 1987, SG, by their solicitors, again requested Krome to pay to SG the sum of US$10,297,297.77 and all further interest. No payment was received by SG from City or Krome in response to the notices.

D & B served a written notice dated 23 April 1987, on City that, pursuant to the Land Titles Act, SG intended to enter into possession of the mortgaged property and to receive the rents and profits thereof at the expiration of one month from the date of the letter.

On 23 May 1987, SG, by a deed of appointment, appointed the second and third plaintiffs to be receivers with powers, inter alia, to receive all rents, profits and income due from the mortgaged property. Written notice of the appointment was served on the tenants.

On 19 June 1987, SG appointed the second and third plaintiffs as their agents and gave them a power of attorney under which they were empowered as agents of SG to enter into and take possession of the mortgaged property and, inter alia, to grant leases and tenancies. On 20 June 1987, the second and third plaintiffs gave written notice to the tenants.

On 20 June 1987, SG instituted the present action against City and Krome. SG claim against City:

(a) a declaration that the mortgage is valid and enforceable in accordance with its terms;

(b) a declaration that the appointment deed is valid.

Against City and Krome, SG claim:

(a) payment to the bank of the said principal sum of US$8,000,000;

(b) payment to the bank of the above-mentioned accrued interest of US$2,523,158.73;

(c) payment to the bank of all such further interest on the said principal sum at Singapore Inter-Bank Offer Rate plus 2% pa as has accrued and shall hereafter accrue under the mortgage from and after 27 May 1987.

City entered appearance on 24 June 1987. On 13 July 1987, the plaintiffs filed the statement of claim. On 22 June 1987, City filed a writ of summons in Suit No 1747 of 1987 against SG and the second and third plaintiffs (City's suit) seeking (inter alia) against SG:

(a) a declaration that the mortgage of 26 November 1981, was void and of no effect;

(b) a declaration that the purported appointment of the second and third plaintiffs as receivers of income of the said premises was in each case void and of no effect;

(c) damages.

City claims (inter alia) against the second and third plaintiffs:

(a) a declaration that their purported appointment as receivers of income was in each case void and of no effect;
(b) for the recovery of all moneys held and received to the use of City with interests;
(c) damages.

On 17 July 1987, in City's suit, City took out an O 14 application vide summons-in-chambers 4985/87 against the second and third plaintiffs only. In the meantime the second and third plaintiffs went about collecting rents, generally carrying out the exercise of SG's mortgagees' rights.

On 17 November 1987, the deputy registrar in summons-in-chambers 4985/87 in City's suit gave summary judgment ordering:

(1) that the private appointment of the second and third plaintiffs as receivers of income by SG be discharged;
(2) that the second and third plaintiffs be ordered to account for all moneys held and received to the use of City;
(3) that damages for trespass to be assessed by the registrar;
(4) that costs fixed at $700 and costs of matters incidental to the order be reserved.

Following the deputy registrar's O 14 order, City informed some tenants that SG were not entitled to collect rent. SG disputed this. There was an exchange of correspondence between D & B and City's then solicitors, Manjit Darshan & Partners, on the right of SG as mortgagees-in-possession to receive rents from tenants despite the order of 17 November 1987.

On 20 November 1987, the plaintiffs filed a notice of appeal against the order of 17 November 1987. On 15 December 1987, the second and third plaintiffs took out an application in City's suit for a stay of execution of the order of court of 17 November 1987, and for an injunction to restrain City from demanding or collecting rent from the tenants of the mortgaged property.

On the hearing of the aforesaid application on 5 January 1988, and by consent it was ordered:

(1) that until the appeal had been decided by the court, an escrow account be opened in the joint names of City and the second and third plaintiffs, and all rentals collected henceforth from the relevant tenants (irrespective of the period to which they relate) shall be paid into the joint account and moneys therein would only be used to pay such expenses as the parties might agree upon;
(2) the joint account was to be operated by the signatures of either the second plaintiff or the third plaintiff and that of City;
(3) there be liberty to apply.

On 7 April 1988, City wrote to Sabena Belgian World Airlines, the tenant of unit #117-10, International Plaza, which was interested in renewing the lease, enclosing the lease agreement for signature. City informed the tenant that City and not SG were rightfully entitled to grant the lease. City warned that if the lease agreement was not signed by 14 April, City would take it that the tenant was no longer interested in the renewal and City would accordingly proceed to sign the lease with another interested party.

On 29 April 1988, City wrote to the second and third plaintiffs warning them that if, acting as agents for SG, they entered into a fresh tenancy agreement with Sabena, City would not recognize the tenancy agreement and would instruct their solicitors to write to Sabena informing Sabena that City would be taking legal action to have Sabena evicted from the said premises.

In the event Sabena signed a tenancy agreement with the second and third plaintiffs as agents for SG. On 18 May 1988, City's solicitors wrote to Sabena's solicitors giving Sabena notice to vacate the premises by 30 June 1988, failing which City would charge Sabena double rent and would seek damages and would take measures to evict Sabena from the premises. On 17 June 1988, the plaintiffs on an ex parte application obtained the interim injunction in this suit.

The second plaintiff in his affidavit made on behalf of himself and on behalf of the first and third plaintiffs, and filed in support of the plaintiffs' ex parte application for an interim injunction in this suit, alleged in para 19 of his affidavit that:

> Notwithstanding the said order of court (5 January 1988) and notwithstanding that the issues in this action have yet to be adjudicated, the first defendants
>
> (1) have threatened a tenant, and unless restrained by this honourable court, will continue to threaten this tenant against entering into tenancy agreement with the first plaintiffs;
> (2) have entered into tenancy agreements (in respect of units 17-04 and 17-11) without the plaintiffs knowledge and consent, and unless restrained by this honourable court, will enter into tenancy agreements, without the plaintiffs' knowledge or consent in respect of the said property.

The second plaintiff in the said affidavit also affirmed (para 20):

> There are several tenancies of the said property which are due for renewal in due course, and if the first defendants are not restrained from issuing threats and from entering into tenancy agreement without the first plaintiffs' knowl-

edge or consent, the first plaintiffs, as mortgagees-in-possession, would have difficulty seeking tenants for the said property as well as monitoring income derived from the said property.

The second plaintiff also affirmed (para 22):

I verily believe that in the light of the first defendants' financial state as shown aforesaid, it appears improbable that the first plaintiffs would be able to recover the sum of US$10,253, 158.73 claimed in this action from the defendants, and unless restrained from carrying out the acts mentioned above, further damage would be done to the first plaintiffs, for which the first defendants would be in no position to remedy.

The plaintiffs' appeal against the deputy registrar's order of 17 November 1987, in City's suit came up for hearing on 16 August 1988, and was dismissed with costs.

The second and third plaintiffs filed an appeal to the Court of Appeal. The appeal has yet to be heard. However, pending the appeal, on the application of the second and third plaintiffs, it was ordered that the assessment of damages be stayed.

The mortgage — background

City were incorporated on 10 November 1972, by Chen Kung @ AK Chen @ AK Chin and his wife, Mrs Chen Wang Tze Kang. At the time of the mortgage the shareholders were Chen Kung, his wife, his infant son Chen Ching, the estate of his deceased infant son, Chen Lo, his daughter Chen Ting Lung, his wife's sister Wang Tze Bo. Cheng Kung, his wife and his wife's sister were the only directors. Cheng Kung was the managing director.

Krome were incorporated in Hong Kong on 18 January 1980. As at 31 December 1980, of the issued share capital, Chen Kung was the registered holder of 400,000 shares (one-third thereof). He was also director of Krome.

The notepaper of Krome showed that they used for their Singapore Office City's address, telephone number and telex reference and number. Chen Kung in his affidavit filed on 2 August 1989, deposed that prior to the loan to Krome, he had had some dealings with SG; that SG at that time were very aggressive in securing new businesses and they were especially keen on breaking into the Taiwanese market and in view of his involvement with the Singapore branch of SG, he was approached by officers of SG and asked to introduce property projects in Taiwan, which SG were keen on financing; that was what led him to become involved in the loan arrangements between Krome and SG.

On 6 April 1981, according to Chen Kung, on the advice of officers of SG, he transferred all his shareholdings of 400,000 shares in Krome to Cheung Tak Wah and resigned his directorship as SG feared that otherwise City, in granting the mortgage security sought, would be violating what is now s 163 of the Companies Act (then s 133A).

Chen Kung's resignation as a director of Krome and his transfer of all his shareholdings to Cheung Tak Wah were no more than a cosmetic change and measure. He was still in charge of the affairs of Krome as subsequent events will show. He obtained advances from SG on behalf of Krome on 14 April 1981, 13 May 1981 and 12 June 1981, for the sums of US$1m, US$1.5m and US$2m respectively.

On 19 June 1981, SG finally issued a letter of offer of loan to Krome, 'Attn: Mr AK Chin'. The letter reads:

Re : Term loan facility

We are pleased to inform you that we are prepared to extend the financing for an office building in Taipei subject to your approval of the following terms and conditions:

Borrower	:	Krome Investment Ltd
Lender	:	Societe Generale, Manila Offshore Branch
Amount	:	US$8m
Purpose	:	Development loan to finance partially the construction of a 24-storey office building in Taipei to be located opposite the Railway Station near Hilton Hotel.
Term	:	Four (4) years from initial breakdown on the loan.
Interest rate	:	2% pa over applicable SIBOR.
Drawdown Schedule	:	Drawdowns on the loan shall be allowed based on the following schedule: US$2.50m in June 1981 US$3.50m between September and December 1981 US$2m between January and March 1982.

Out of the advance of US$2m to Krome on 12 June 1981, by SG, a sum of US$1.4m was, by agreement between Krome and City, utilized by City to redeem a mortgage of the mortgaged property City had given to a finance company — Asia Commercial Finance Ltd Singapore.

On 2 August 1981, Krome's directors passed a directors' resolution that Krome would take the US$8m loan from SG to be secured as follows:

(a) a first legal mortgage of the mortgaged property belonging to City;
(b) joint and several personal guarantees of Mrs Chen Wong Tze Kang, Chen Kung and four others for US$8m;
(c) joint and several guarantees of Townking Enterprises Co Ltd Taiwan.

And that Chen Kung be 'appointed and authorized to borrow City Holdings (Pte) Ltd's property and make the necessary arrangements for pledging the said property to the bank and co-ordinating with the bank on matters related to the said loan and to sign Societe Generale's letter Ref LD L : 068/81 dated 19 June 1981, thereby accepting the terms and conditions of the said loan facility, stated therein.'

On 4 August 1981, City's directors passed a directors' resolution that City do lend the title deeds to the mortgaged property to Krome for Krome to mortgage to SG as security for the loan.

On 15 August 1981, Krome drew down another US$2m from SG and Krome on 27 August 1981, by letter signed by Chen Kung confirmed the draw-down.

On 26 August 1981, Chen Kung and his wife, Mrs Chen Wang Tze Kang (and others) personally signed a guarantee in favour of SG to secure Krome's repayment of the loan.

On 16 September 1981, City passed a shareholders' (Chen Kung, his family and Wang Tze Bo) resolution that City do mortgage the mortgaged property to SG to secure the loan of US$8m to Krome. Chen Kung and all other major shareholders also resolved to execute a deed to subrogate their rights to SG in the event that City were liquidated to the extent of the amount outstanding under the mortgage in favour of SG as at the time of liquidation.

On 18 September 1981, Krome by letter signed by Chen Kung requested SG to release another US$1m to Krome.

On 20 October 1981, Krome passed another directors' resolution to supersede the directors' resolution passed on 2 August 1981. Essentially the resolution was a repetition of the earlier one.

In October 1981, City and Krome executed the mortgage. Chen Kung as director of City had the common seal of City affixed to the mortgage in his presence. The mortgage was executed by SG and lodged with the Land Titles Registry where it was registered and has remained so registered to this day.

The salient features of the mortgage are these:

(1) The mortgage was given under the Land Titles Act (Cap 276, 1970 Ed) (now Cap 157, 1985 Ed).
(2) Clause 1 of the Covenents and Conditions ('the C & C') of the mortgage provides the payment to SG *on demand* the term loan of US$8m with interest.
(3) Clause 2 of the C & C provides that until such demand is made the term loan is to be paid by six instalments as follows:
    (i) on or before 31 March 1983, US$1.5m;
    (ii) on or before 30 September 1983, US$1.5m;
    (iii) on or before 31 March 1984, US$1m;
    (iv) on or before 30 September 1984, US$1m;
    (v) on or before 31 March 1985, US$2m;
    (iv) on or before 30 June 1985, US$1m.
(4) Clause 7(i)(a) of the C & C provides that if City or Krome or either of them defaulted in payment of any of the instalments or interest for a period of one month after the time appointed for the payment, then repayment of the whole of the balance of the term loan and other moneys and interest may be demanded by SG and at the expiration of one month from the date of the demand the whole of the balance of the term loan and other moneys and interest shall become due and payable to SG.
(5) City are not permitted to execute any lease or grant any tenancies of the mortgaged property or any part thereof without the previous consent in writing of SG (cl 7(i)(d) of the C & C).
(6) The mortgage was executed under the common seal respectively of City and Krome. Both companies were advised and represented by solicitor, Mr Lim Sin, who gave a certificate pursuant to s 50 of the Land Titles Act (now s 54) (Cap 157, 1985 Ed) certifying that the mortgage is correct for the purposes of the said Act.

Events before SG entered into possession of the mortgaged property

A Maintenance Fees:

On 5 January 1985, the management corporation of International Plaza sued City for the sum of $423,076.36 being maintenance and other contributions and interests due to them in respect of the mortgaged property as at 15 December 1984.

On 1 November 1985, the management corporation obtained by consent of City summary judgment against City for:

(i) the balance sum of $303,216.70;
(ii) interest on $303,216.70 at 10%pa from 15 December 1984, to date of judgment;
(iii) $43,313.24 lump sum interest; and
(iv) $700 costs.

City then had a discussion with the management corporation and proposed a schedule of payments in respect of the judgment debt. The first payment in November 1985 of $30,321, then a monthly payment of $10,000 from December 1985 to November 1986, a monthly payment of $30,000 from December 1986 to May 1987 and a final payment of interest accrued in June 1987.

However, after paying instalments — November 1985 — $30,321, January 1986 — $10,000, February 1986 — $10,000, March 1986 — $27,453 and May 1987 — $4,347.08 (totalling $82,121.38) — City failed to pay any more money to the management corporation.

By July 1987, additional maintenance fees of $215,473.80 had fallen due and payable.

The management corporation, apparently having lost patience, had the mortgaged property charged with

the repayment of these moneys. An instrument of charge pursuant to the Land Titles (Strata) Act was registered in the land register against the mortgaged property on 6 March 1987.

The situation had become so bad that on 17 March 1987, in reply to the management corporation's letter of 23 February 1987, the Commissioner of Building advised the management corporation 'to, without any further delay, exercise its powers of sale under s 35 of the Land Titles (Strata) Act Cap 227' and sell off the mortgaged property and recover the arrears of maintenance fees which was the duty of the management corporation.

B Property Tax:

There was a substantial amount of $200,506.99 owing by City to the Property Tax Department by 1986 and this was being discharged by irregular payments to the Property Tax Department:

23 April 1986	—	$20,000
4 July 1986	—	$10,000
5 August 1986	—	$10,000
17 October 1986	—	$10,000
13 March 1986	—	$5,000
5 May 1987	—	$5,000
		$60,000

At the time when SG went into possession there was still a substantial sum of arrears of property tax due by City.

The case of the plaintiffs is that the conduct of City, after they obtained summary judgment on 17 November 1987, against the second and third plaintiffs, had compelled SG to seek the injunction on 17 June 1988, so that SG could exercise the rights which the mortgage and the law gave to SG.

Apart from the principle that SG should not be denied their said rights, there were, submitted plaintiffs, other reasons why it was imperative that SG had to control the possession and income of the mortgaged property:

(i) City had no capacity to repay the debt and SG's only hope or reducing their loss lay in the sale of the mortgaged property.

(ii) The mortgaged property was already imperilled under the administration of City. As at 19 June 1987, when SG appointed the second and third plaintiffs as agents to take possession, substantial property tax and maintenance fees were in arrears. The property tax arrears by law constituted a charge on the mortgaged property and the management corporation had on 6 March 1987, lodged an instrument of charge in the Registry of Titles against the mortgaged property.

The plaintiffs submit that it was essential that the mortgaged property should be productive of income and the plaintiffs could not afford to have City discouraging tenants or prospective tenants.

Further, whilst City were collecting rental, there was real possibility of City utilizing rental income collected for purposes other than discharging property tax and maintenance fees.

The plaintiffs contend that whilst City were struggling to pay arrears of property tax and maintenance fees, City were giving substantial loans to directors. As at 31 December 1986, $2,931,442 was still outstanding.

It is argued on behalf of City that the interim injunction ought to be dismissed on the following grounds:

(i) There had been substantial and gross misrepresentation by SG as well as a failure to disclose material facts to the court when the ex parte application was heard.

(ii) The balance of convenience is clearly in favour of lifting the interim injunction.

(iii) The injunction should not have been obtained ex parte.

(iv) SG could not claim to be mortgagees-in-possession.

It is submitted that SG had failed to disclose and inform the court the following material facts:

(a) That the US$8m claimed in the writ was being disputed and that there was a substantial defence that the US$8m was never released to Krome.

(b) That it was City's contention that the whole letter of offer and the mortgage which was created pursuant thereto was in fact a total sham and the loan was never disbursed out through SG, Taipei Branch, for the account of Town King Enterprise Co Ltd.

(c) That City had all along maintained that the appointment of the second and third plaintiffs as agents for SG under the power of attorney was invalid and that City had successfully argued in City's suit that the appointment of the second and third plaintiffs as receivers of income under the same power of attorney was invalid.

(d) That City had raised a counterclaim by way of City's suit which was filed just two days after SG filed their present suit. City's suit had put the whole validity and enforceability of the mortgage in issue.

It is submitted that SG had misrepresented to the court the following facts giving the impression that there was a need for an interim injunction:

(i) Misrepresented that at the time the ex parte application was made, City were in arrears of property tax and maintenance fees of $164,691.92 and

$467,108.34 respectively when, in fact, City had fully paid the property tax and a sum of $115,000 was already paid for the maintenance fees.

(ii) Misrepresented that City were insolvent and would not be able to pay SG their full claim if the injunction was not granted when, in fact, City were fully capable of compensating SG for all the damage suffered by them if they failed to obtain an interim injunction.

(iii) Misled the court into thinking that massive loans were made to the directors of City by producing only the cumulative total of the loans and not mentioning that the directors had in fact at that time been making substantial repayments to City.

On the issue of the validity of the mortgage, the main reason which City have most strongly put forward is that they were induced by the misrepresentation of SG into giving the mortgage. They pleaded in para 7 of their defence as follows:

Particulars

(a) By a document in writing dated the 26th day of November 1981, 1st the (sic) plaintiffs purported to take a mortgage over the whole of the first defendants' premises.

(b) At all material times, prior to any alleged execution of any documents, the first plaintiffs or their authorized agents in order to induce the first defendants to make and complete such documents represented to the first defendants the following:

(i) that the borrower was Krome Investment Ltd of Hongkong (hereinafter called the 'borrower');

(ii) that the amount to be lent out was US$8m for a term period of four years from drawdown;

(iii) that the purpose was to finance the construction partially of a 24-storey office building in Taipei Taiwan;

(iv) that the channelling of funds will take place through an account of Taiwan company known as Town King Enterprise Co Ltd through their bank account of the first plaintiffs maintained in the Taipei Branch;

(v) that the title deeds of the first defendants were only to be held until the year 1985 and be returned thereafter.

(c) The said representations were contained in the first plaintiff's letter of offer of 19 June 1981 and in other written communications between the first plaintiffs and the company known as Krome Investment Ltd and the Taiwan company known as Town King Enterprise Co Ltd.

(d) Acting on the faith and the truth of the said representations and induced thereby, the first defendants were made a party of the mortgage.

(e) The first defendants have since discovered and the fact is that each of the representations was untrue in that:

(i) the borrower, Krome Investment Ltd was and is a company with no known assets to justify a loan of US$100,000 let alone US$8m and such fact was known to the first plaintiffs at all material times;

(ii) US$8m was never released to the borrower and such fact was known to the first plaintiffs at all material times;

(iii) the borrower did not even maintain a bank account with the first plaintiffs and further or in the alternative, has never been a prior customer of the first plaintiffs and such fact was known to the first plaintiffs;

(iv) the express purpose of the financing was a sham and/or the loan was never disbursed out through Societe Generale, Taipei Branch for the account of Town King Enterprise Co Ltd and such fact was known to the first plaintiffs at all material times.

In paras 8 and 9 City pleaded:

8 Further and/or in the alternative, the first plaintiffs made the said representations intentionally and either well knowing that they were false or untrue or recklessly not caring whether they were true or false.

Particulars

(a) the first plaintiffs were aware that the purported offer as expressed in their letter of offer of 19 June 1981 was a device to enable the bank to regularize previous loans already disbursed out to individuals or corporations known to the first plaintiffs;

(b) it was known to the first plaintiffs that the US$8m was not released to the account to Town King Enterprise Ltd and Societe Generale, Taipei as represented in the said letter of offer;

(c) the first plaintiffs took a promissory note from Krome Investment Ltd, Hongkong on or about August 1981 for the entire US$8m. The said promissory note has long since matured but the first plaintiffs have never presented the same for payment or even issued a demand letter on it and the first defendants contend that this is consistent with para 8(e)(iii) (sic) above stated;

(d) it is known to the first plaintiffs that the consideration as reflected in the mortgage documents is obviously untrue and a misrepresentation.

9 Further and/or in the alternative, if contrary to the contention of the first defendants the said representations were not made intentionally, the first defendants will rely upon the provisions of the Misrepresentation Act or such other statute bye law or regulations as entitling them in the premises to the reliefs and defences in law available and/or including those available at common law.

Defence (1) that the loan of US$8m was never disbursed to Krome, (2) that City were induced by the misrepresentation of SG into giving the mortgage; (3) that the letter of offer and the mortgage created pursuant thereto was a sham

The argument of counsel for City is this. The mortgage was created pursuant to the letter of offer dated 19 June 1981. Krome was the borrower and the purpose of the loan was to finance partially the construction of a 24-storey office building in Taiwan. The length of the loan was four years. The drawdown schedule was: US$2.5m in June 1981; US$3.5m between September and December 1981; US$2m between January and March 1982.

Counsel says that the drawdown on the loan 'shall be allowed based on the schedule' but no money was disbursed to Krome pursuant to the schedule stipulated in the letter of offer.

Counsel says that the advances (totalling US$8m) which Chen Kung obtained from SG on behalf of Krome on 14 April 1981, 13 May 1981, 12 June 1981, 27 August 1981, 18 September 1981, and 12 November 1981, were short term loans for three or six months. They were totally inconsistent with the letter of offer. Further there was no reference to any mortgage to be created as security. Furthermore, the advances were made in most cases to the personal account of Chen Kung and not Krome.

Counsel submits that there is no evidence that the US$8m disbursed was pursuant to and in accordance with the terms of the letter of offer which made no mention of the earlier advances, gave a completely different schedule of disbursements and set out various securities for the loans which were not even referred to at all in the letters of drawdown. Counsel submits that by no stretch of the imagination can one make any connection between the letter of offer and the 'short-term' loans. They were two clearly separate loans: one to Krome and the other for the account of Chen Kung.

Counsel argues that since City have shown that no moneys were disbursed pursuant to the letter of offer, it must follow that the mortgage which was created pursuant thereto in fact secured nothing. Counsel submits that being the case there is no question of repayment and default in repayment by City and it follows that SG were not entitled to appoint themselves as mortgagee-in-possession and to obtain an interim injunction on that basis.

The evidence is this. SG, who had some dealings with Chen Kung, discussed with him the doing of further business. Chen Kung is a shareholder and director of City. Chen Kung was a shareholder and director of Krome as well. Krome had links with Town King Enterprise Co Ltd. Chen Wen Sun, who was a one-third shareholder and director of Krome, was also the chairman of Town King Enterprise Co Ltd. Krome must have contemplated having an interest in the construction of a 24-storey office building in Taipei by Town King Enterprise Co Ltd. There was a discussion of the proposal for SG to give the US$8m loan to Krome for financing partially the said construction in consideration of, inter alia, City giving to SG the mortgage.

In order to clear what, according to Chen Kung, was a statutory hurdle (s 133A of the Companies Act) to City giving the mortgage as security for the loan, Chen Kung, on the advice of SG, resigned his directorship and transferred all his shareholdings in Krome.

The details of the loan were apparently still not finalized and SG had explained why they began to make the advances. Prior to the letter of offer being issued Chen Kung requested that earlier advances be made by SG towards the partial financing of the office block project in Taipei. SG agreed to it. As the necessary legal and security documentation had yet to be completed these earlier advances had of course to be identified as 'short-term' loans in Krome's letters signed by Chen Kung of 14 April 1981, 13 May 1981, and 12 June 1981.

Subsequent to the letter of offer Chen Kung made further requests for further advances ahead of the completion of the security documentation. Although these further advances were requested earlier than the drawdown schedule set out in the letter of offer, SG again agreed to the same.

The security documentation was signed by Krome in or about late October/early November 1981. By this time SG had advanced US$7.5m out of the US$8m they had agreed to lend. Because of that Chen Kung then on behalf of Krome in Krome's letter of 12 November 1981, requested for the balance of US$500,000 to be released. As there was only one loan of US$8m to Krome, this request by Krome for the release 'of the balance of $500,000' made it clear that all the earlier advances made by SG to Krome were all meant to be towards the US$8m loan contemplated by the letter of offer.

SG have exhibited correspondence between SG and Krome which shows that the parties had unequivocally acknowledged that the earlier advances totalling US$7.5m were subsumed into the US$8m loan set out in the letter of offer. In fact in November 1984 Krome discussed with SG their request for the US$8m loan to be extended for a further five years. This discussion extended up to January 1985. In their letters of 25 January 1985 Krome spoke of getting SG's approval 'for disposal of the International Plaza office spaces (even though the market here for office space is very weak) in order to reduce the overall liabilities, especially the interest servicing burden.' Krome ended their letter:

> As you have mentioned over the phone in response to our earlier letter of 22 November 1984 that your bank was not surprised that we are asking for a further 5 years' extension of the said loans, we hope that you can settle this issue as soon as possible. Meanwhile, we also have to seek your bank's understanding of the situation in the form of either a freeze in the interest charges or in the least some consideration of nominal interest charge.
>
> We look forward to your kind consideration as we definitely need this respite to tie over this extremely difficult period and we thank you for your patience and understanding.

In their letter of 30 September 1985 to Krome, SG enclosed the computation of the outstanding unpaid and overdue amounts as per 23 September 1985, of the US$8m loan and asked Krome to confirm and acknowl-

edge the correctness of the figures 'to forestall any dispute which may arise in the future regarding amounts payable under the loan.' SG also reminded Krome that no payment had been made on the account since 21 August 1984.

In reply Krome in their letter dated 25 October 1985, referred to interest of US$1,226,672.77 and the sum of US$81,374.75 payable for penalties, recorded in the accounts and said:

> It seems to us that you may have overlooked our request to you made in our letter of 25 January 1985, whereby we requested you to make certain concessions with regard to interests.

Krome said that they would be most grateful if SG could kindly consider this question. Krome asked SG to consider waiving all interest 'or at worst, if you must charge interest, consider charging interest on a minimal scale, sufficient to cover your costs of funds only.' And further said:

> If you are to continue charging interest on the principal on a purely commercial rate, as you are doing, we fear that it would not be possible for us ever to catch up on paying arrears to the extent that we may break under the pressure.

Krome in the same letter referred to their previous correspondence in which they outlined to SG their plans for repaying the loan and said:

> We are sure you agree these plans are realistic, viable and will definitely be implemented in due course to the mutual benefit of both *yourselves as our financiers* and ourselves (emphasis added). We therefore need your understanding to give us a chance to survive this particular period so that we are able to implement our said plans. This chance we ask for is in the form of your waiver or minimization of interest as abovementioned.

Krome ended their letter informing SG regarding the progress of the Taipei project and that Mr Chang the new partner had recently taken over the management rights of Lai-Lai-Shangri-la Hotel in Taipei.

SG replied to Krome on 20 December 1985. Referring to Krome's request that interest and penalties presently charged on the US$8m overdue loan account be reduced at the minimum, SG said:

> But you have also consistently told us that your project of rerecting (sic) a 48 storeys building in Taipei is feasible and would finally prove to be a profitable venture. We hope that the facts will demonstrate the rightness of your judgment, and therefore do not see why we should give up the interests which are legitimately due to us. You will also appreciate that there is not much sense for us to waive a debt (the interests and penalties) which is due to us unless this debt is effectively settled. *This is why we are pleased to offer to you that we are willing to waive all penalties, and even our commercial margin, thereby only charging you with the cost of funds, for all overdue interests or portion of overdue interests which you would now settle.* We hope that you would like to consider this offer and revert to us soon.

SG ended their letter:

> We believe that it would be useful if we could discuss all aspects of the project (Taipei project) and the status of our loan soon and would like to receive your suggestions for a meeting early in the new year.

Krome in their letter of 28 January 1986, to SG, conveyed to SG their appreciation to SG for their concession of charging interest on the basis of costs of funds only.

In their letter of 28 February 1986, to City, 'attention AK Chin', SG referred to their (Chin and SG) discussion of 17 February 1986 and asked Chin to confirm that 'You would use 50% of the US$7.5m which are still due to you by Mr HC Chang (the new partner) as part of his contribution to the new development company, to repay almost 50% of our overdue US$8m loan to you.'

In the letter of 9 May 1986, AK Chin writing on behalf of Krome referred to SG's letter of 28 February 1986 and said:

> After much consideration and taking into account the many factors working adversely against my overall investments, I have to arrive at the following conclusion.
>
> (1) We would like to confirm that the 17th floor (previously known as 16th floor) International Plaza should be sold if and when proceeds of about US$4m can be realized. The sale could take place any time at the bank's discretion. That will take care of 50% of the outstanding loan of US$8m. Should the proceeds be less than the target of US$4m, the balance shall then be repaid over a period of two years, effective after total repayment of the balance 50% of the loan of US$8m has been completed. On the other hand, should the bank decide to sell at a later date in anticipation of a better sale price and should the proceeds exceed US$4m, then that portion of the proceeds over and above US$4m shall be fully lodged with the bank to cover the interest element.
> In this connection, could your bank with its worldwide connection assist in marketing the said property.
>
> (2) As regards the balance of US$4m, I would ask to be allowed a repayment in equal instalments of US$0.5m spread over a period of eight years effective as of end March 1987.
> This indulgence on your part is necessary because of the following factors:
>
> (i) It takes time for the project to take off in turns of financial arrangement, health economic climate, market demand situation, etc.
> (ii) I can see my interest eroding over time and am trying very hard to line up some other parties to take over my share. In order to accomplish this arrangement, I might have to sell at a substantial loss or dilute my shareholdings to other third party in order to meet the instalment payment noted above.
> (iii) As it is now, I am carrying on under many difficulties and much pressure from so many angles. Of relevance is the fact that I do not have the financial means right now.

(3) In the circumstances, waiver of all payments of interest, other than that possibility mentioned in (1) above, should be given serious consideration by the bank.

The letter ended:

> It is hoped that your bank can consider accommodating this proposal for repayment as, I am sure, you are fully aware of our current adverse financial position. Inspite of the very difficult situation, we have every intention of honouring the loan and with your bank's goodwill, we should be able to discharge the loan in due course.

SG replied to the letter of 9 May 1986, on 3 June 1986, addressed to AK Chin 'Krome Investment Ltd'. SG said:

> We very much appreciate your difficulties, given the present unfavourable economic conditions in South east Asia, and especially in Singapore. We shall continue to do our best to ease your difficulties, and you will agree that we have so far exercised amicable patience on your overdue US$8m loan, the interests of which have not been paid since almost two years.

SG said that it was for the investor to make the prime efforts necessary to reach recovery, and 'this is why we advise the following scheme':

> 1 You should sell your share in the Taipei Landmark project, that is you should sell your share in the property of the land (lots 137, 138-1 and 139-1 sub-division 2, Kuang Yuan Division) reserved for the construction of a 48-storey office building. This would enable you to pay off our loan completely and also to generate additional cash for other needs. This is the most logical solution to solve the problems created by this always delayed project. We urge you to consider this recommendation and let us know how it could be implemented in the near future.
> 2 We agree to envisage the sale of your Anson Road, International Plaza property and shall initiate contacts in this respect. But we would wait for more certain figures about the value of this property before deciding on the sale.
> 3 You should offer us a more detailed and realistic project of payments out of rentals of your Singapore property. Specifically we would like to know what are the rentals per unit, and who are the tenants, and what is the schedule of payments to the management corporation in respect of the improvements.
>
> If it would appear that no more than S$2,607.55 can be earned by you monthly, we should be tempted to take up direct possession of the mortgaged premises.
>
> We are aware that payments to be derived from the rentals may not be high compared to the magnitude of the overdue loan, but we insist that significant payments should be made to compensate for the rentals which we could sequester otherwise, and to show your goodwill to the servicing and ultimate repayment of the loan.
>
> We expect your early consideration and reply.

On 13 June 1986, AK Chin replied to SG on behalf of Krome. AK Chin said that Krome were indeed grateful for SG's forbearance on this particular account. He said that SG's advice in scheme (1) was noted. However, conditions in Taipei being as they were, and of the project in particular, did not permit him to sell his share in the property in the way SG recommended. If it was possible he would certainly like to do so and would have done so much earlier. The problems were twofold which he elaborated. He urged SG, while he was arranging to raise 'substantial construction loans', to seriously reconsider the repayment proposal enumerated in Krome's letter of 9 May 1986. He said:

> I am making this arrangement in order that I will be able to meet with the proposed commitment to your bank. As far as I can see, this is the most practical arrangement to ensure that the account with your bank will not remain dormant indefinitely.

It is Mrs Chen Wang Tze Kang who is making all these allegations, on behalf of City, against SG, by way of her numerous affidavits. Nowhere in her affidavits has she made any allegation that Chen Kung, her husband, deceived City. Surely Mrs Chen must have known what her husband was doing and was prepared to abide by his actions and that was why she gave a personal guarantee with Chen Kung and others, to SG on or about 26 August 1981.

City's allegation that it was 'represented' to them in the letter of offer that the title deeds to the mortgaged property were only to be held until the year 1985 and be returned thereafter, is not substantiated. A perusal of the letter of offer will show that there was no such 'representation'. It is nonsense for City to expect the mortgage to be discharged without the loan being first repaid.

Taking into consideration the events that took place before the letter of offer and in the face of the letters which passed between Krome (which were all signed by AK Chin) and SG, it would appear that the allegations of City are baseless.

Defence that the appointment of the second and third plaintiffs as agents of SG under the power of attorney is invalid

Counsel for City says that City have always maintained that the appointment of the second and third plaintiffs as SG's agents under the power of attorney is invalid. This was known to SG when they applied to the court for the ex parte injunction and this was not disclosed to the court.

Counsel says that City had made a similar argument in City's suit (Suit 1747 of 1987) to remove the second and third plaintiffs as receivers of income and were successful at both the O 14 stage as well as the appeal in showing that Antoine Larue de Charlus, the attorney under the power of attorney, in fact had no power to make such an appointment. Again this fact ought to have been made known to the court.

The appeal of the plaintiffs against the order of the deputy registrar given on 17 November 1987, came before AP Rajah J on 16 August 1988, and was dis-

missed with costs. The second and third plaintiffs have filed an appeal to the Court of Appeal. The appeal has yet to be heard.

When the appeal was argued before AP Rajah J, counsel for City totally abandoned the point that the appointments of the second and third plaintiffs as agents of SG were invalid. The deputy registrar merely ordered the discharge of the second and third plaintiffs as receivers of income and did not touch on SG's status as mortgagees-in-possession. City have the temerity to resurrect this point before me. The complaint of city has no merit.

Defence that the mortgage is tainted by illegality and is unenforceable

City have contended in their defence that the purported loan transaction as contemplated by the letter of offer was illegal under the laws of Taiwan. That being the case, the mortgage too is tainted by the illegality and hence unenforceable. To support this submission City have produced the legal opinions of Dr Raymond Yuming Don and Dr Yuan-Ho Lai.

SG have produced the comments of Dr CV Chen on the legal opinions of Dr Raymond Yuming Don and Dr Yuan-Ho Lai.

City have not pleaded the factual basis for the allegation. Moreover, their Taiwanese law experts' opinions have been totally contradicted, with elaborate reasoning, by SG's Taiwanese law expert and they have not been replied to show in what way SG's expert has been wrong. It was almost on the eve of the hearing of this motion that City have amended their defence to plead that the loan agreement is illegal under the laws of Taiwan. The defence was first filed on 23 July 1987 and it was two years later that it was amended on 7 August 1989, and the first hearing of this motion was on 16 August 1989.

City have not established that the mortgage is tainted by illegality. In any case it is an issue to be tried at the trial.

Contention of City that the injunction should not have been obtained ex parte

The argument of counsel for City is that an ex parte injunction for an interim injunction should only be made if there are special circumstances of extreme urgency and where serious damage is imminent which would be irreversible.

The facts alleged and relied on by SG, says counsel, were:

(1) City had threatened *one* tenant against entering into a tenancy agreement with SG.

(2) City had entered into *two* tenancy agreements without SG's consent.

(3) As a result of (1) and (2) SG alleged that they would have difficulties seeking tenants and monitoring income derived from the mortgaged property.

(4) SG relied on various misrepresentations of facts and non-disclosures when making the ex parte application for the injunction.

Counsel submits on these facts there was absolutely nothing at all to justify an injunction, let alone one obtained ex parte.

Counsel says in the first place SG have the security of the mortgage for their claim and were completely secured. Secondly, City had been granting tenancies even after the mortgage was created with the knowledge of SG. Thirdly, there was no evidence to show that an inter partes application for an injunction would cause irreparable harm to SG. All the incomes were to be placed in an escrow account anyway. SG's position was secured.

Counsel says it is significant to note that SG's application for the interim injunction proceeded on the premises that they were in fact mortgagees-in-possession of the mortgage property. Counsel submits that SG can only obtain an interim injunction in respect of those claims as stated in the statement of claim.

Counsel says that in the statement of claim SG made no claim to be mortgagees-in-possession. He argues that the interim injunction cannot be sustained on grounds not raised by the statement of claim.

In support of this argument counsel for City relies on the case of *Burdett* v *Hay*.[1] *Burdett* v *Hay*[1] decided two things:

(i) It was irregular for the court upon a defendant's motion to dissolve an injunction obtained against him ex parte, to grant any new injunction.

(ii) Especially so if the new injunction was not granted in the terms of the bill.

Burdett v *Hay*[1] was decided in 1863, more than 315 years ago. Since then there have been statutes enacted which empower the English courts to grant injunctions. Similar statutory provisions have been enacted in Singapore. Section 4(8) of the Civil Law Act (Cap 43, 1985 Ed) specifically provides for the granting of interlocutory injunctions. The section reads:

> A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order be made.

The procedure for invoking the jurisdiction of the High Court under s 4(8) is laid down in O 29 r (1) of the Rules of the Supreme Court 1970, which reads:

> An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

This Rule is derived from, and is in pari materia with, the English Rules of the Supreme Court O 29 r 1(1). *Bean on Injunctions* (4th Ed, 1987) at p 51 commented:

> An interlocutory injunction (though not a perpetual one) may be granted although not specifically claimed in writ; it may be appropriate as a holding measure even though the final relief sought at trial will be of a different nature.

It is clear that the court could grant the ex parte interim injunction. The injunction sought bore some sensible relationship to the cause of action.

Slade LJ in *Brink's-Mat Ltd* v *Elcombe*[2] had this to say with regard to the principle of full disclosure (p 194):

> The principle is, I think, a thoroughly healthy one. It serves the important purposes of encouraging persons who are making ex parte applications to the court diligently to observe their duty to make full disclosure of all material facts and to deter them from any failure to observe this duty, whether through deliberate lack of candour or innocent lack of due care.

The principle has to be viewed in perspective. Slade LJ commenting on the application of this principle said (pp 194-195):

> Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *R* v *Kensington Income Tax Comrs* principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.

Balcombe LJ in the same case said (p 193):

> The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a twofold purpose. It will deprive the wrongdoer of an advantage improperly obtained: see *R* v *Kensington Income Tax Comrs, ex p Princess Edmond de Polignac* [1917] KB 486 at 509. But it also serves as a deterrent to ensure that persons who make ex parte applications realize that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained.

Brown-Wilkinson V-C in *Dormeuil Freres* v *Nicolian Ltd*[3] commenting on Slade LJ's observations, said (p 200):

> That account of the experience in the Court of Appeal I echo as being my experience also.

He further said (p 200):

> In my judgment save in exceptional cases, it is not the correct procedure to apply to discharge an ex parte injunction on the grounds of lack of full disclosure at the interlocutory stage of the proceedings. The purpose of interlocutory proceedings is to regulate the future of the case until trial.

After dealing with an Anton Piller order and a Mareva injunction made ex parte, he concluded (p 201):

> In my judgment, therefore, in the ordinary case it is wrong on the hearing of an inter partes motion to go into the huge complexities involved in seeking to disentangle at that stage whether there was full disclosure when the ex parte order was obtained. The matter should normally be dealt with at trial in the way I have indicated.

City's allegation of failure to disclose material facts

The material facts which City maintain should have been disclosed are questions of law and facts which should be tried at the trial. I have dealt with these defences earlier in my judgment. In my view City have no cause to complain for their non-disclosure.

City's allegations of misrepresentation by SG:

(a) Arrears of maintenance fees and arrears of property tax

The second plaintiff in his affidavit in support of the ex parte application deposed that when he and the third plaintiff took possession of the mortgaged property on behalf of SG there were arrears of maintenance fees and property tax of $467,108.34 and $164,691.92 respectively. Counsel for City complains that the second plaintiff failed to disclose in his affidavit that the whole of the arrears of property tax of $164,691.92 were fully settled in February 1988 and a total sum of $115,000 had been paid in respect of maintenance fees between 2 March 1988 and 27 May 1988.

City do not dispute the fact that as on 19 June 1987, huge arrears of maintenance fees and property tax, which had been caused by City, remained yet to be settled. The complaint of SG is that when the mortgaged property was left under the care and control of

City, City had suffered the mortgaged property to be charged with the repayment of these huge arrears in maintenance fees and property tax. The reduction of these by City was only made because these payments were forced by the intervention of SG. I have narrated the events leading up to the setting up of the escrow account and the undertaking to apply the moneys paid into the account for such outgoings. I have dealt with the maintenance fees and property tax earlier in my judgment. There clearly was no misrepresentation by SG.

(b) Insolvency of City

I have narrated the events that took place, after the mortgage, between City and SG. It is clear that at the time the interim injunction was applied for City were unable to pay the term loan and the accumulated interest. As at 24 February 1987, the debt stood at $22,396,622 with interest accumulating and continuing to accumulate. There was clearly no misrepresentation by SG.

(c) Loans to directors

Counsel for City complains that SG sought to give the false impression that large payments of money were being lent to directors even whilst City were facing severe difficulties with the payment of arrears of maintenance fees and property tax. The actual fact, says counsel, is that since 1986 the directors have been making substantial repayments to City to reduce the outstanding sums due to City.

The annual audited accounts of City showed the following sums as owing by a director:

1980 — $761,523
1981 — Nil
1982 — $2,286,582
1983 — $3,333,121
1984 — $3,911,901
1985 — $4,084,414
1986 — $2,931,442
1987 — $2,868,489
1988 — $2,473,499

In their report dated 10 July 1989, the auditors, Patrick Tay & Co, stated that at the date of the report the director had repaid $652,983 to reduce his indebtedness to the company and that it was their understanding that further repayments would be made to eventually bring the figure to zero balance.

The loans were made not to directors but to a director. There is no denying that the loans were substantial and that they were made at the time that City were not able to pay the arrears of maintenance fees and property tax. The sum still due from the director at the time the application for interim injunction was made was $1.8m, not an inconsiderable sum, and there were huge arrears of maintenance fees and property tax not yet paid. There was clearly no misrepresentation by SG.

(d) SG would have difficulties seeking tenants

Counsel for City says that SG failed to inform the court that the earliest tenancy coming up for renewal in the second half of 1988 was only on 31 July 1988, more than five weeks after the ex parte injunction was obtained.

The short answer of SG to that is that landlords do not start looking for new tenants on the eve of the expiry of tenancies. They have to ensure early that existing tenants agree to take fresh tenancies on the expiry of their current tenancies;, and they have to start marketing early to ensure that fresh tenants are secured to replace the outgoing tenants immediately.

The written threats and denunciations of SG which City were issuing to the existing tenants clearly show that SG would have difficulties in getting tenants.

(e) SG anticipated difficulties in monitoring rentals from the mortgaged property

Counsel for City says that SG failed to inform the court that City had kept SG fully informed of all incoming rentals collected on the mortgaged property. SG's point is that there were several tenancies which were due for renewal in due course and if City are not restrained from issuing threats and from entering into tenancy agreements without SG's knowledge or consent, SG, as mortgagees-in-possession, would have difficulty seeking tenants as well as monitoring income derived from the mortgaged property.

(f) SG stating that no payment was received from City in response to SG's letter of demand dated 14 March 1987

Counsel for City says that SG failed to disclose that City had replied to the notice of 14 March 1987, through their solicitors, vigorously disputing SG's claim to be mortgagees and denying any liability whatsoever. The second plaintiff in his supporting affidavit deposed that City filed a suit against SG in Suit No 1747 of 1987 and exhibited a copy of the writ of summons endorsed with a statement of claim in which City sought, inter alia, a declaration that the mortgage was void and of no effect.

It is a fact that no payment was received from City in response to the notice of demand of SG.

Balance of convenience

Counsel for City submits that if SG are able to establish the validity of the mortgage at the trial, they would be

adequately compensated by an award of damages for any loss sustained by City being allowed to exercise all rights as registered proprietor without interference by SG.

Counsel for City says that SG's claim against City is for a liquidated amount and therefore quantifiable. Counsel argues that SG have a security for the claim which is the mortgage and this interest is registered with the Land Titles Registry. Therefore, any transactions involving the mortgaged property would be subject to that interest. The fact that the mortgaged property is not in the control and management of SG will not cause any harm which is irreparable to SG.

On the other hand, argues counsel, if City succeed in establishing the validity of the mortgage at the trial, they cannot be adequately compensated by SG's undertaking as to damages for the following reasons:

(A) Prejudice to livelihood of City. As a result of the injunction, City have been cut off from their only source of income and substantial assets and prevented from conducting the business for which they were incorporated to do.

On the other hand, SG would not be prejudiced if there is no injunction. Their interest would be secured by the mortgage. In fact the only loss, if at all, by SG is the loss from the collection of the rentals. This is easily quantifiable and compensated and in any case, under the order of court, the moneys were placed in an escrow account which would have protected SG's interest. The latest valuation report on the mortgaged property valued the same to be worth $20m which is more than SG's full claim.

(B) Loss of City's commercial goodwill and reputation. Counsel for City says that the continuance of the injunction would have the effect of signalling to the business community that:

(a) City are in financial difficulties to the extent of having lost control over their only substantial asset;
(b) City are not a good credit risk;
(c) City no longer have any substantial assets under their control that can generate income for the continued operations of the business;
(d) City are now effectively indebted to SG for over $10m when in fact the matters are still in dispute.

Counsel says that in fact as a result of the injunction, City have lost a substantial amount of goodwill as evidenced by the fact that many of City's loyal tenants have terminated their tenancies. Counsel submits that the consequences of such harm to City's business reputation are not only difficult to assess but irreparable.

(C) The injunction tantamount to judgment against City. Counsel for City says that the effect of depriving City from the income of their only substantial asset throughout the tenure of the injunction until trial and the loss of City's commercial goodwill and reputation would result in financially throttling City to a point where they may no longer have the financial resources to continue with the present action and to prosecute their claim in Suit No 1747 of 1987. In such an event, the continuance of the injunction would be tantamount to giving SG judgment against City without permitting City the right of trial.

(D) City better able to manage the mortgaged property. Counsel for City says that in the brief 2½ years since SG took possession of the mortgaged property, SG have not been keeping the units well tenanted. By comparison, in a period of 13 years, City lost a total of only 1,518 days whereas in just 2½ years SG have already lost 1,802 days. These are the days where the units are left vacant.

Counsel further says that SG's practice seem to be to tender a letter threatening the tenants with liability for mesne profits unless they hand over the keys and vacant possession whenever the tenants give notice to quit. Such threats against ex-tenants are hardly conducive to creating goodwill. SG's continuing control of the mortgaged property would only cause more harm to the ability of the same to earn money. In fact, there is evidence that the second and third plaintiffs have not been tenanting the units at market rate but instead at a rate lower than market rate.

Counsel for City submits that the interim injunction ought to be discharged as the balance of convenience is clearly in City's favour. The principles to be applied in applications for interlocutory injunctions have been authoritatively explained by Lord Diplock in *American Cyanamid Co* v *Ethicon Ltd.*[4] These principles are conveniently summarized at p 473 of the 1988 *White Book* as follows:

(1) the plaintiff must establish that he has a good arguable claim to the right he seeks to protect;
(2) the court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried;
(3) if the plaintiff satisfied these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on the balance of convenience.

As to the first two principles, however, there is a line of cases which hold that if as a matter of fact the plaintiff establishes *more than* a good arguable claim, more than

a serious question to be tried, a case to which the defendant has no arguable defence, the court will without more grant the interlocutory injunction without going on to consider the balance of convenience. This line of cases is summarized by Hanbury and Maudsley in *Modern Equity* (13th Ed, 1989). The following passage appears at p 725:

> (iii) Where no arguable defence. It has been held that the *American Cyanamid* rules do not apply where the defendant has no arguable defence. In such a case it is not necessary to consider the balance of convenience. Thus the plaintiff may obtain an interlocutory injunction to restrain a clear trespass even where it causes no damage; or to restrain a clear misapplication of union funds. It is probable that the principle that the plaintiff is entitled almost as of right to an injunction to restrain a plain breach of a negative contract provides another example.

This principle is also referred to in AS Burrows' *Remedies for Torts and Breach of Contract* (1987 Ed). The following passage appears at p 392:

> Some judges, like Walton J in *Athletes Foot Marketing Associates Inc* v *Cobra Sports Ltd* and Bridge LJ in *Office Overland Ltd* v *Gunn*, have recognized a further wide-ranging exception, namely, that *American Cyanamid* does not apply where there is little dispute on the facts and the law is not difficult. This should be supported, for Lord Diplock's reasoning — that there should be no mini-trials on inadequate evidence and argument — is inapplicable to such a case. In similar vein, Sir John Pennycuick in *Fellows* v *Fisher* thought that it was particularly in cases 'depending in whole or in great part upon the construction of a written instrument' that the prospect of success was within the competence of the judge hearing the interlocutory application; and in *Official Custodian for Charities* v *Mackey*, Scott J thought *American Cyanamid* inapplicable where there was no arguable defence to the plaintiff's claim. Particularly radical was the Court of Appeal's view in *Bradford Metropolitan City Council* v *Brown* that *Cyanamid* was essentially concerned only with factual as opposed to legal disputes.

SG claim that they are mortgagees who have the right to exclude City from granting leases or collecting rental in respect of the mortgaged property. Their right is based on the mortgage which has been registered at the Land Titles Registry under the provisions of the Land Titles Act since 1982 unchallenged by City until they were required to pay the moneys which they had covenanted under the mortgage to do. SG had demanded City to make such payment and no moneys have been paid in response to such demand.

Section 69(1) of the Land Titles Act provides that:

> if default is made in payment of the interest, principal or other money, secured by a mortgage or charge, or in payment of any part thereof, *the mortgagee* or chargee *shall, as against the mortgagor* or chargor and those claiming through or under him, *be entitled to enter into possession of the mortgaged* or charged *land and to receive the rents and profits thereof.* (Emphasis added.)

Section 69(2) provides that the said power of entry into possession is exercisable when a one-month notice has been given to the mortgagor. Such a notice was served and received by City and their solicitors Messrs Manjit Darshan & Partners.

Section 69(4) provides that:

> Whenever a mortgagee or chargee has given notice of his intention to enter into receipt of the rents and profits of the mortgaged or charged land to the tenant or other person liable to pay or account for them, the receipt in writing of the mortgagees or chargee shall be a sufficient discharge for any rents and profits therein expressed to be received, and any person paying them shall not be bound or concerned to inquire as to any default or other circumstances affecting the right of the person to give such notice beyond the fact of this being duly registered as mortgagee or chargee of the land.

Section 23(2)(a) of the Conveyancing and Law of Property Act (Cap 61, 1985 Ed) provides:

> *A mortgagee of land while in possession*, as against all subsequent incumbrancers, if any, *and as against the mortgagor*, may make time from to time
>
> (a) an agricultural or occupation lease for any term not exceeding 21 years; (Emphasis added.)

When the interim injunction was applied for, the second and third plaintiffs as agents for SG had given notices to all the tenants of the units in the mortgaged property to pay the rent to them and were collecting rent from them. In the case of two units they had in the name of SG granted tenancies. SG had therefore in law gone into possession of the mortgaged property, (*Baalman on The Singapore Torrens System* (1961 Ed) at p 140; *Francis Thomas on Mortgages and Securities* (3rd Ed, 1986) at p 146).

The rights of SG have already vested when they applied for the interim injunction and it was not necessary to make an inter partes application. City have not persuaded me that the statutory provisions cited above should be suspended or that I should cast off a solemn contract which City have apparently voluntarily entered into. I am of the view that City have no arguable defence and it is not necessary to consider the balance of convenience.

The factors in assessing the balance of convenience is conveniently summarized in *Modern Equity* by Hanbury and Maudsley (13th Ed, 1989) at p 716:

> While the balance of convenience is the governing consideration, a significant factor in assessing it is the inadequacy of damages to each party. If that does not provide an answer, then other aspects of the balance of convenience will arise. If the balance of convenience does not clearly favour either party, then the preservation of the status quo will be decisive. Only as a last resort is it proper to consider the relative strength of the cases of both parties, and only then if it appears from the facts set out in the affidavit

evidence, as to which there is no credible dispute, that the strength of one party's case is disproportionate to that of the other.

Finally, other special factors may have to be considered in individual cases.

Thus it will be seen that there is a series of rules, most of which will apply only if the previous one has not afforded a solution. But, as Browne LJ stated in *Fellowes & Son* v *Fisher,* the remedy is discretionary and the principles enunciated by Lord Diplock contain some elements of flexibility. The House of Lords cannot have intended to lay down rigid rules. They are best described as guidelines.

On the factor of the adequacy/inadequacy of damages, Goldrein and Wilkinson in *Commercial Litigation: Pre-Emptive Remedies* (1987 Ed) have this to say (at p 86):

Once the court has found that there is a serious issue to be tried, it should go on to consider the adequacy of the respective remedies in damages available for either party. In this regard the cases should be read in the context of the following dicta of Sachs LJ in *Evans Marshall & Co Ltd* v *Bertola SA* [1973] 1 WLR 349:

'The standard question in relation to the grant of an injunction 'Are damages an adequate remedy?' — might in the light of recent authorities, be rewritten — 'Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?''

In this case SG have by operation of the Land Titles Act and the Conveyancing and Law of Property Act, acquired the status of mortgagees-in-possession. City, by their acts and letters which I have described, tried to dislodge SG as mortgagees-in-possession. SG are merely defending a position which the law has given them and the interim injunction against City to restrain the acts complained of is justifiable.

Damages in this case would not be adequate to SG. City do not have any source of income over and above that which can be derived from the mortgaged property and do not have the means to pay any appreciable damages.

City have filed on affidavit to show that the current open market value of the mortgaged property as at 19 January 1990, was $20,058,000.

SG say that even as at 24 February 1987, the sum owing by city was US$10,297, 297.77 (S$22,396,622). As at 15 February 1990, with the accummulated interest, this indebtedness had increased to US$13,861,238.77 (S$25,955,169.59, at rate of US$1 = S$1.8725). The interest which is accruing on the principal is approximately S$200,000 per month.

The rents which can be collected from the mortgaged property have to be applied to the payment of maintenance fees to the management corporation (including the arrears which accumulated during the time when City were managing the mortgaged property), property tax, repair costs and other outgoings and housing agents' commission for procuring tenants. The surplus, if any, would not be sufficient to meet the said monthly interest. In any event, say SG, such surplus should go towards account of repayment of the said debt so that it does not keep growing.

I find that there is evidence that when City were managing the mortgaged property, and the arrears of maintenance fees and property were accruing, City were utilizing the rental income collected to settle expenses other than those directly to the mortgaged property.

City had been threatening the tenants from complying with the requirements of SG. If City are not restrained, the tenants would be placed in a difficult position. Until the mortgage is set aside, as they are trying to do, it is not right for them to frighten any tenant into taking their side. That would expose the tenant to legal action by SG for failing to pay rent to SG.

Counsel for City submits that the relevant status quo to preserve is the state of affairs during the period immediately preceding the issue of the writ.

The status quo is not only limited to that period but also the period immediately preceding the motion for an interlocutory injunction. Lord Diplock in *Garden Cottage Foods Ltd* v *Milk Marketing Board*[5] said (p 140):

The status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo.

I have described the status quo at the time of the interim injunction. SG had been vested by law and contract with a certain status and had thereby become entitled to enjoying certain rights which had occurred. City were attempting to usurp the said status. SG had in law entered onto the land and City were trying to oust them. SG were exercising the undoubted rights given to them by law and City were trying to prevent this.

For the reasons I have given I conclude that the interlocutory injunction should continue. There will be an order in terms of the motion.

Application allowed.

Solicitors: *Cooma Lau & Loh; Allen & Gledhill; Drew & Napier.*

Reported by *Zarinah Marican*